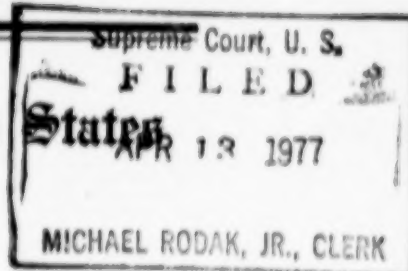


76-1423

**Supreme Court of the United States**  
OCTOBER TERM, 1977



No. 77-

In the Matter of the Application of  
CHARLES E. SIGETY, d/b/a FLORENCE NIGHTINGALE  
NURSING HOME,

*Appellant,*

*against*

RICHARD V. HORAN, Welfare Inspector  
General of the State of New York,

*Appellee,*

For an Order Pursuant to Article 78 of  
the Civil Practice Law and Rules.

ON APPEAL FROM THE COURT OF APPEALS  
OF THE STATE OF NEW YORK

**JURISDICTIONAL STATEMENT**

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April 13, 1977.

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**Supreme Court of the United States**

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No. 77-

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In the Matter of the Application of

CHARLES E. SIGETY, d/b/a FLORENCE NIGHTINGALE  
NURSING HOME,

*Appellant,*

*against*

RICHARD V. HORAN, Welfare Inspector General  
of the State of New York,

*Appellee,*

For an Order Pursuant to Article 78 of  
the Civil Practice Law and Rules.

---

ON APPEAL FROM THE COURT OF APPEALS  
OF THE STATE OF NEW YORK

---

**JURISDICTIONAL STATEMENT**

Charles E. Sigety, d/b/a Florence Nightingale Nursing Home ("Mr. Sigety") appeals from an order of the Court of Appeals of the State of New York entered January 13, 1977, — N.Y.2d — (1977), which affirmed the order of the Appellate Division – First Department of the Supreme Court of the State of New York, 50 App.Div.2d 779 (1st Dept. 1975), affirming an unreported decision of a Special



Term of the Supreme Court of the State of New York, County of New York, denying Mr. Sigety's application for an order restraining appellee's predecessor from releasing an investigatory survey report evaluating the compliance with law of the operations of his nursing home (the "report") until he had been afforded a reasonable opportunity to review and to comment on the contents of that report.

Mr. Sigety submits this Jurisdictional Statement to show that this Court has jurisdiction of this appeal and that a substantial question is presented.

### **Opinion and Proceedings Below**

By Order to Show Cause of Hon. Sidney A. Fine dated January 16, 1975, Mr. Sigety commenced a special proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules in the Supreme Court of the State of New York, County of New York, seeking to restrain appellee's predecessor from releasing to the general public an investigatory survey report evaluating the compliance with law of the operations of his nursing home until after he had been afforded a reasonable opportunity to review and to comment on that report. Justice Fine's January 16, 1975 order temporarily restrained, pending the hearing and the Court's determination on Mr. Sigety's application, appellee's predecessor from releasing or disclosing to the public any of the information contained in the report.

A hearing on Mr. Sigety's application was held on January 27, 1975, before Hon. Irving H. Saypol. Justice Saypol rendered a decision on September 19, 1975, which denied Mr. Sigety's application. (A copy of Justice Saypol's unreported decision is annexed as Appendix A). On October 9, 1975, pursuant to Justice Saypol's September 19, 1975 decision, an order and judgment denying Mr. Sigety's application and dismissing his petition was entered in the New York Supreme Court.

On October 10, 1975, Mr. Sigety served and filed his Notice of Appeal to the Appellate Division - First Department of the New York Supreme Court. Pursuant to Section 5519(e) of the New York Civil Practice Law and Rules the provision of Justice Fine's January 16, 1975 order temporarily restraining appellee's predecessor from releasing any of the information contained in the report remained in effect.

On December 18, 1975, the Appellate Division rendered a memorandum decision, 50 App.Div.2d 779 (1st Dept. 1975) (Kupferman, J. dissenting) affirming the decision of Justice Saypol. (A copy of the Appellate Division's memorandum decision is annexed as Appendix B). On December 31, 1975, Mr. Sigety served and filed his Notice of Appeal from that decision. Again, pursuant to Section 5519(e) of the New York Civil Practice Law and Rules the restraining provision of Justice Fine's January 16, 1975 order was continued.

On January 13, 1977, the New York Court of Appeals unanimously affirmed the memorandum decision of the Appellate Division and remitted the matter to the Supreme Court, New York County. (A copy of the Court of Appeals' order of remittitur is annexed as Appendix C). In affirming the memorandum decision of the Appellate Division the Court of Appeals held Article 27 of the New York Executive Law (McKinney 1972) valid over Mr. Sigety's challenge that it was repugnant both to the laws and to the Constitution of the United States. Mr. Sigety contended that the New York statute was repugnant to Sections 1306(e) and 1396(a)(36) of Title 42 of the United States Code and the regulations promulgated thereunder, because it fails to provide a contractor or provider of services pursuant to the New York Medicaid plan adopted pursuant to Section 1396(a) of the Social Security Act, 42 U.S.C. § 1396(a), a reasonable opportunity (not exceeding 60 days) to review and to offer com-

ments on an official survey report evaluating the compliance with law of the performance by such a contractor or provider of services. The New York Court of Appeals also rejected Mr. Sigety's contention that Article 27 of the Executive Law is repugnant to the Constitution of the United States, because it ignores the pervasive and strong interest of the State of New York mandated by the United States Constitution in preventing attacks upon reputation and, as interpreted by the New York Court of Appeals, condones the publication of an official report which the State has conceded is false and defamatory.

Mr. Sigety served and filed his Notice of Appeal to this Court on January 26, 1977. (A copy of Mr. Sigety's Notice of Appeal to this Court is annexed as Appendix D). Pursuant to the law of New York the restraining provision of Justice Fine's January 16, 1975 order remains in effect pending final disposition of this appeal.

### Jurisdiction

The jurisdiction of this Court to review by direct appeal the order of the New York Court of Appeals is conferred by 28 U.S.C. § 1257(2). *Dahanke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *La Crosse Tel. Corp. v. Wisconsin Board*, 336 U.S. 18 (1948); *Guss v. Utah Labor Board*, 353 U.S. 1 (1957).

### Questions Presented

Two questions are presented by this appeal:

1. Whether the plan for medical assistance adopted by the State of New York pursuant to Subchapter XIX of the Social Security Act, 42 U.S.C. § 1396(a), is repugnant to federal law because it fails to provide a contractor or provider of services pursuant thereto a reasonable opportunity (not exceeding 60 days) to review and to comment on an official survey report

prepared by the State evaluating the compliance with the law of the contractor or provider of services.

2. Whether the plan for medical assistance adopted by the State of New York pursuant to Subchapter XIX of the Social Security Act, 42 U.S.C. § 1396(a), is repugnant to the United States Constitution because, even in light of the admission by the State of New York that an official report prepared pursuant thereto was false and defamatory, the plan nonetheless denied the defamed citizen a reasonable opportunity to review and to comment on the official report prior to the release of the report by the State of New York to the general public.

### Statement of the Case

Sometime prior to October 1974, the Office of the New York State Welfare Inspector General commenced an audit and investigation of the books and records of Florence Nightingale Nursing Home ("Florence Nightingale") of which Mr. Sigety is the sole proprietor. Since December, 1967, Florence Nightingale has been a "skilled nursing facility" and a "provider of services" under both the Medicare (42 U.S.C. § 1395, *et seq.*) and Medicaid (42 U.S.C. § 1396, *et seq.*) Programs. The investigation, which was conducted on a voluntary basis without the use of any compulsory process, (a) had the ostensible purpose of inquiring into payments made to Florence Nightingale by the State during 1972 for costs incurred in connection with the Medicaid Program and (b) apparently was conducted to fulfill the obligations of the State of New York to the Federal government imposed by Sections 1396(a)(9) and (30) of the Social Security Act, 42 U.S.C. §§ 1396(a)(9) and (30).

At no time prior to January 8, 1975, was Mr. Sigety advised by appellee's office that a draft report had been prepared, nor was Mr. Sigety afforded any opportunity



to review any such report or to offer any comments or corrections.

Nonetheless, on January 8, 1975, an article appeared in *The Village Voice* which purported to describe the contents of a report relating to Florence Nightingale. The article claimed that, according to the report, Mr. Sigety had been reimbursed under the Medicaid Program out of public moneys for numerous non-health related expenses. (A copy of *The Village Voice* article is annexed as Appendix E\*). A similar article appeared in *The New York Times* the very next day, which additionally indicated the intention of appellee's predecessor to make the report public the following week (i.e., the week of January 12). (A copy of *The New York Times* article is annexed as Appendix F).

Upon discovering the false and defamatory nature of certain portions of these articles and on January 10, 1975, Mr. Sigety caused a letter to be delivered to appellee's predecessor (a) referring to the scurrilous and derogatory character of the charges appearing in those articles and (b) requesting that he be given a reasonable opportunity to examine the report prior to its release to the general public in order to rebut any inaccuracies.

Mr. Sigety's letter led to several meetings with officials of appellee's office in the course of which these officials acknowledged that the published material was erroneous and defamatory and, therefore, that the draft report itself would have to be revised.

On January 14, 1975, in response to an inquiry by his counsel, Mr. Sigety was advised by an official of the Office of the Welfare Inspector General (a) that the report had not been corrected and (b) that he would not be given an op-

\* Although *The Village Voice* article is dated January 13, 1975, it appeared on the newsstands in New York City on January 8, 1975.

portunity to examine the report prior to its release to the general public but that he could request a copy afterwards if he so desired. In addition, Mr. Sigety was informed that dissemination of the uncorrected report to the general public and to other public agencies in the near future could not be excluded. These statements were later confirmed in a letter from appellee's predecessor to Mr. Sigety dated January 15, 1975. Confronted with the impending, unlawful disclosure of the report before he had had an opportunity to review and, if necessary, correct it, Mr. Sigety commenced the Article 78 proceeding in the New York Supreme Court.

### The Questions Are Substantial

The Federally funded assistance program commonly referred to as Medicaid, 42 U.S.C. § 1396, *et seq.*, was adopted for the purpose of enabling each State to furnish medical and other health related services to individuals whose income and resources are insufficient to obtain such necessary services for themselves. During 1976, pursuant to the Medicaid Program, the federal government spent \$8,306,295,396, of which \$1,575,522,826 was paid to the State of New York. *State Expenditures for Public Assistance Programs Approved Under Titles I, IVA, X, XIV, XVI, XIX, and XX of the Social Security Act*, U.S. Dept. of Health, Education & Welfare, Social & Rehabilitation Service, Office of Financial Management, Division of Finance, 1977.

#### A. The Medicaid Eligibility Requirements.

In order to be eligible to receive Federal Medicaid funds, the State of New York was required to adopt a plan for medical assistance in strict accordance with § 1396(a) of Chapter XIX of the Social Security Act, 42 U.S.C. § 1396(a) and the regulations promulgated thereunder. Section 1396(a) contains a myriad of Federally mandated requirements. A number of the subsections of Section 1396(a) read in the aggregate\* impose upon the State of

\* E.g. 42 U.S.C. §§ 1396(a)(9), (26), (27), (30), (31) and (36).

New York a comprehensive obligation (a) to inspect and to audit facilities which receive payment of Medicaid funds for providing medical and health related services (to assure that (i) the services are performed properly and (ii) the payments received for performing such services are appropriate) and (b) to prepare, to submit and, in certain instances, to make available for public inspection official reports setting forth the pertinent information obtained during the course of such inspections and audits. In substance, these Federally mandated requirements obligate the State of New York to determine and, in certain instances, to disclose publicly whether or not Medicaid funds are being properly disbursed to provide appropriate medical and health related services. Perhaps more simply stated, Title XIX of the Social Security Act requires the State of New York, among other things, to determine whether or not Medicaid funds are being obtained fraudulently by providers of medical and health related services, such as Mr. Sigety.

#### **B. The New York Welfare Inspector General.**

The bureaucratic arm of the State of New York charged with a portion of that responsibility is the office of Welfare Inspector General.\* That office was created pursuant

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\* Pursuant to § 1396(a)(9) of Title XIX of the Social Security Act, 42 U.S.C. § 1396(a)(9), the State may designate several state agencies "... which shall be responsible for establishing and maintaining standards, other than those relating to health, for such institutions [which provide services pursuant to the Act]." Section 1396(a)(36) provides that:

"... following the completion of each survey of any health care facility, laboratory, agency, clinic, or organization, by the appropriate State agency described in paragraph (9), such agency shall (in accordance with regulations of the Secretary) make public in readily available form and place the pertinent findings of each such survey relating to the compliance of each such health care facility, laboratory, clinic, agency, or organization with (A) the statutory conditions of participation imposed under this title, and (B) the major

(footnote continued on following page)

to Article 27 of the Executive Law (McKinney 1972).<sup>\*</sup> Section 762 of Article 27 sets forth the functions, powers and duties of the office of Welfare Inspector General. It provides:

"§ 762. General functions, powers and duties of office of welfare inspector general

The office of welfare inspector general, by and through the welfare inspector general, or his duly authorized deputy, director, assistant, officer or employee, shall have the following functions, powers and duties notwithstanding section one hundred thirty-six of the social services law:

1. To receive and investigate complaints from the public or any other source concerning alleged abuses, suspected frauds, and other violations of the welfare system.
2. To receive complaints of alleged failures to prosecute frauds against the welfare system, and to investigate the same.
3. To receive complaints of alleged failures to enforce the state's laws regarding the employment of welfare recipients in available employment, and to investigate the same."

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(footnote continued from preceding page)

additional conditions which the Secretary finds necessary in the interest of health and safety of individuals who are furnished care or services by any such facility, laboratory, clinic, agency, or organization." (Emphasis and matter in brackets added).

\* Pursuant to Chapter 214 of the Laws of 1975, the Office of Welfare Inspector General was transferred to the Department of Audit and Control, effective July 1, 1975. Article 27 was repealed, and the matters contained therein were re-enacted as Sections 46-50 of Article 4 of the Executive Law. The repeal and re-enactment of those provisions do not have any material bearing on this appeal.



### C. The "Leaked" Portions of the Report.

The charges made in the "leaked" portions of the draft report to which reference is made in the newspaper articles (Appendices E and F) demonstrate, as appellee admitted below, that the report which Mr. Sigety seeks to review and on which he seeks to comment prior to its release to the general public is a survey report evaluating the compliance with law of the operation Florence Nightingale by Mr. Sigety. It is fair to say that stripped of their editorial niceties the newspaper reports state that upon its release by appellee the report will show that Mr. Sigety has committed Medicaid fraud.

### D. The Federal Statutory Safeguards Against Official Attacks Upon Reputation.

Section 1396(a)(36) of the Social Security Act, 42 U.S.C. § 1396(a)(36), requires that survey reports such as the one prepared by the Welfare Inspector General be made available by the Welfare Inspector General for public inspection "in accordance with regulations of the Secretary."<sup>\*</sup> The regulations promulgated by the Secretary clearly contemplate affording a provider of services such as Mr. Sigety a reasonable opportunity to review and to comment on survey reports or other formal evaluations of his operation of his facility.

Regulation 250.70 adopted under Title XIX of the Social Security Act states in pertinent part:

"Regulation Sec. 250.70. Disclosure of information on providers of health care services and contractors.—A State plan for medical assistance under title XIX of the Social Security Act *must provide* that:

(a) A procedure will be established for disclosure of pertinent findings contained in documents which result from surveys of any health care facility,

<sup>\*</sup> 42 U.S.C. § 1396(a)(36) is quoted *supra* at 8-9.

laboratory, agency, clinic, or organization providing health care services, performed by State standard-setting agencies described in section 1902(a)(9) of the act for the purpose of determining eligibility of such providers to begin or continue participation in the State's medical assistance program, and of other documents described in this section. The procedure established *must* meet the following requirements:

"(1) Documents subject to disclosure include [i] survey reports prepared after January 31, 1973, by the survey agency, [ii] *official notifications [to the provider] of findings prepared by the survey agency based on such reports*, [iii] *any pertinent parts of written statements relating to such reports and findings furnished by the provider to the survey agency*, and [iv] information regarding ownership of a skilled nursing facility (as prescribed in section 1861(j)(11) of the act and 20 CFR 405.1121(a)) and of an intermediate care facility (as prescribed in § 249.33(a)(3) of this chapter)." (Emphasis and matter in brackets added).

The Federal regulation thus clearly contemplates (a) official notification to Mr. Sigety by appellee of the findings by appellee set forth in the report and (b) a reasonable opportunity for Mr. Sigety to submit to appellee a written statement in reply to those findings *after* he has had an opportunity to review appellee's notification of his findings set forth in the report and *prior* to appellee's public disclosure of the contents of the report.

The fundamentally fair principle of affording a provider a reasonable opportunity to review and to comment on an official report evaluating the compliance with law of his operation of his facility is a pervasive theme throughout the Social Security Act. For example, Sections 1306 (d) and (e) of the Act provide:

"(d) Notwithstanding any other provision of this section the Secretary shall make available to each State agency operating a program under subchapter XIX of this chapter and shall, *subject to the limitations contained in subsection (e) of this section*, make available for public inspection in readily accessible form and fashion, the following official reports (not including, however, references to any internal tolerance rules and practices that may be contained therein, internal working papers or other informal memoranda) dealing with the operation of the health programs established by subchapters XVIII and XIX of this chapter—

(1) individual contractor performance reviews and other formal evaluations of the performance of carriers, intermediaries, and State agencies, including the reports of follow-up reviews;

(2) comparative evaluations of the performance of such contractors, including comparisons of either overall performance or of any particular aspect of contractor operation; and

(3) *program validation survey reports and other formal evaluations of the performance of providers of services*, including the reports of follow-up reviews, except that such reports shall not identify individual patients, individual health care practitioners, or other individuals.

"(e) No report described in subsection (d) of this section shall be made public by the Secretary *or the State subchapter XIX agency until the contractor or provider of services whose performance is being evaluated has had a reasonable opportunity (not exceeding 60 days) to review such report and to offer comments pertinent parts of which may be incorporated in the public report*; nor shall the Secretary be

required to include in any such report information with respect to any deficiency (or improper practice or procedures) which is known by the Secretary to have been fully corrected, . . . ." (Emphasis added).

An identical right is conferred to a provider under the rules promulgated by the Department of Health, Education & Welfare ("HEW") under the Medicare program, which provide for the public disclosure of Medicare validation reports only *after* affording a provider a reasonable opportunity to review and to comment on such reports:

#### "A161. DISCLOSURE OF VALIDATION REPORTS

The Secretary of Health, Education and Welfare shall make available for public inspection on written request formal Federal evaluations of the performance of providers (without identification of individual patients or other individuals), specifically, the program validation survey reports of provider performance to be released by the health insurance regional office. These reports cover a provider's operation and administration, including accounting practices, delivery of services, and utilization review. *Such reports will not be made public until the provider has had opportunity (not more than 30 days) to review and offer comments on the report and these comments will be made public with the reports.*" (Emphasis added.)

HEW's *Skilled Nursing Facility Manual*, HIM-12.

The reason for the Social Security Act's various provisions which consistently afford a provider such as Mr. Sigety an opportunity to review and to comment on a survey report or other formal evaluation of the compliance with law of his operation of his facility is obvious. Government agencies are staffed by people and people from time to time make mistakes. It is therefore fundamentally fair and consistent with due process of law for



government to afford an individual whose reputation may be irreparably injured a reasonable, yet brief, period of time within which to prevent widespread public dissemination of erroneous official government reports. Not only may an erroneous report have serious financial consequences, but the provider may also find himself, as in the present case, subjected to extensive false and derogatory comment in the press.

The interpretation of the New York Court of Appeals of Article 27 of the Executive Law as not requiring that a provider such as Mr. Sigety be afforded a reasonable opportunity to review and to comment on an official survey report or other formal evaluation of the compliance with law of his operation of his facility is thus repugnant to the laws of the United States. The holding of the Court of Appeals has wide-ranging effect, because it denies each member of the entire Medicaid industry in the State of New York the significant Federal statutory right to protect himself from inadvertent and erroneous official attack on his reputation.

**E. The Federal Constitutional Safeguard Against Official Attacks Upon Reputation.**

The New York Court of Appeals held that the State was free to disseminate an official report which it admitted was erroneous and defamatory. This Court has long recognized society's deep and pervasive interest in preventing attacks upon reputation. *Rosenblatt v. Baer*, 333 U.S. 75, 86 (1966); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 261 (1974). We submit that in sustaining the opinions below the New York Court of Appeals paid no heed to its constitutionally mandated duty to protect Mr. Sigety's reputation from attack, not by a private individual or group of private individuals, but rather by his government.

During the pendency of this proceeding it has become increasingly fashionable for politicians to attack the nurs-

ing home industry in general and Mr. Sigety, who operates the largest nursing home in New York City, in particular. This perhaps sheds some insight on appellee's intractable insistence that the State was free to publish a report regarding Mr. Sigety which it conceded was erroneous and defamatory.

It is significant that Mr. Sigety has never sought to restrain the public dissemination of the report either permanently or even for an extended period of time. All that he has sought is the opportunity to review the report for a period of one week and, if appropriate, to submit to appellee a written reply thereto. In view of (a) the reasonableness of the relief sought by Mr. Sigety and (b) the political climate in which all operators of nursing homes within New York have recently found themselves, the observations of Mr. Justice Stewart in his concurring opinion in *Rosenblatt* appear particularly apt:

"The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem.

\* \* \*

"Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society." 383 U.S. 93-94.



### Conclusion

For the foregoing reasons, this Court should reverse the Court of Appeals of the State of New York and direct that appellant be afforded a reasonable opportunity to review and to comment on the report of the Welfare Inspector General prior to the release of the report to the general public.

Dated: April 13, 1977.

Respectfully submitted,  
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### APPENDIX A

DECISION BY SAYPOL, J.

SUPREME COURT OF THE STATE OF NEW YORK,  
 SPECIAL TERM PART I, NEW YORK COUNTY  
 at the Courthouse thereof, 60 Centre Street,  
 New York City 7, New York.

Present: HON. IRVING H. SAYPOL, *Justice*.

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In the matter of the application of  
 CHARLES E. SIGETY, etc.

*against*

WILLIAM F. MEYERS

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The following papers numbered 1 to 12 read on this motion, Argued & Submitted on Calendar of Jan. 31, 1976.

	Papers Numbered
Filed—Order to Show Cause and Affidavit Exhibits .....	2-8
Answer, Affidavit, Cross Motion, Exhibit .....	9-11
Affidavit of Francis Waschler .....	12

Upon the foregoing papers this motion is disposed of as follows: As anticipated by the Court, sua sponte, and now advised by the Attorney General it is the law, L. 1975, C.654, that reports of governmental agencies respecting facilities like the petitioner's nursing home shall be main-

*Appendix A.*

tained as public information available for public inspection. Copies of such reports shall be maintained for 10 years. The department making the report is mandated by the new law to make available and supply at nominal cost such reports. This moots the issue, the motion is denied and the proceeding is dismissed.

Dated September 19, 1975

IHS  
J.S.C.

Briefs: Plaintiff's .... Defendant's .... Petitioner's ✓  
Respondent's X Relator's ....

Briefs .....

**APPENDIX B****MEMORANDUM DECISION OF THE APPELLATE DIVISION**


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In the Matter of the Application of  
CHARLES E. SIGETY, d/b/a FLORENCE NIGHTINGALE  
NURSING HOME,  
*Petitioner-Appellant,*  
*against*  
RICHARD V. HORAN, Welfare Inspector  
General of the State of New York,  
*Respondent-Respondent.*

---

Before STEVENS, P.J., and KUPFERMAN, LUPIANO, LANE,  
and NUNEZ, JJ.

**PER CURIAM.**

Judgment, Supreme Court, New York County, entered October 10, 1975, dismissing as moot the petition of petitioner to restrain respondent from releasing to the public a report pertaining to Florence Nightingale Nursing Home or, in the alternative, to permit petitioner to review contents of the report prior to any public release, affirmed without costs and disbursements.

We agree with Special Term that the enactment of section 1, L.1975, c. 654, effective September 1, 1975 (Public Health Law § 2805-e), has rendered the instant proceeding moot. That statute requires nursing homes to make inspection reports prepared by governmental agencies available for public inspection. Further, the "office of the commissioner and each regional office of the department shall make

## Appendix B.

available for public inspection . . . all financial and inspection reports of residential health care facilities filed with or issued by the department" (Public Health Law § 2805-e[2]). The new provision is part of a broad scheme by which governmental agencies are required to supervise the finances of and the health care provided by nursing homes (See L.1975, cc. 652, 653, 655). Its passage is evidence of a strong legislative intention to make public the results of such investigations. Petitioner contends that the statute pertains solely to "financial" and "inspection" reports and not to "investigation" reports. He further characterizes the document in issue here as an "investigation report". To adopt the hypertechnical reading which petitioner attempts to place on the enactment would frustrate the purpose of the statute. Respondent's investigation related to matters which the legislature has deemed worthy of public exposure. Accordingly, we view L.1975, c. 654 as applying to the report in question.

Note is taken of Executive Law § 48(9) which requires respondent "(t)o do all things necessary or convenient to carry out the functions, powers and duties set forth . . . to the extent they conform with *applicable* federal requirements, if any" (Emphasis supplied). Petitioner contends that he is entitled under this statutory provision to preview the respondent's report prior to any public release. The only support for this contention is reference to federal statutes and regulations affording a provider of services the right to review evaluative reports (See, e.g., 42 U.S.C. § 1306[d] and [e]). However, these statutes have no relation to state supervision of nursing home facilities. While the policy underlying the provisions cited may be desirable, it is clear that federal law imposes no requirement of prior review upon state agencies. This subject, in light of the public policy delineated in the

## Appendix B.

broad statutory scheme alluded to above, is more properly one for the legislature.

All concur except KUPFERMAN, J., who dissents in part in the following memorandum:

I concur with the majority, although the matter is not free from doubt, and would affirm the dismissal of the petition to restrain the Welfare Inspector General from releasing the report in this matter. I differ, however, in the determination which refuses the petitioner the opportunity to see the report before it is released and to comment thereon.

The verified petition in this matter was filed in January 1975, but the determination by the Court at Special Term was not until September 1975, seemingly to allow for the effective date of an amendment to the Public Health Law §§ 2805-e and 2896-h to require the opportunity for public inspection "of all financial and inspection reports of residential health care facilities filed with or issued by the department." Prior to September 1, 1975 there was no specific requirement for public inspection. There is also a question as to whether this report denominated by the Welfare Inspector General as an investigative report falls within the category provided of "financial and inspection" provided for in Public Health Law § 2805-e(2). Further, if an investigative report, it becomes an exception to the Freedom of Information Act which provides in § 88 of the Public Officers Law for "access to records". Among the exceptions of items not to be made available, is subdivision 7-d: "part of investigatory files compiled for law enforcement purposes." Nevertheless, I agree that any doubt should be resolved in favor of public disclosure.

The other aspect raises an entirely different question. First, the law provides for an opportunity for comment



## Appendix B.

with respect to any evaluation by the "provider of services" inspected.

The Florence Nightingale Nursing Home here involved is such a "provider of services" under both Medicare, 42 U.S.C. § 1395 et seq. and Medicaid, 42 U.S.C. § 1396 et seq. Programs. § 1106(e) of the Social Security Act, 42 U.S.C. § 1306(e) provides that no such report may be made public until there has been a reasonable opportunity to review such report and to offer comments with respect thereto. The provisions of the Federal law (and especially so because the Federal Government provides a substantial part of the monies involved in the programs) are incorporated by virtue of Executive Law § 48(9)\* as a matter of State Requirement with respect to the functions of the Welfare Inspector General.

Aside from what I deem to be the requirements of the law in this area, the matter of the Fairness Doctrine, *cf. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), would seem here to apply. On or about January 8, 1975, there appeared in the Village Voice of January 13, 1975, a weekly newspaper, an article by Jack Newfield, an investigative reporter, with respect to the report here involved. This was followed up by an article in the New York Times of Thursday, January 9, 1975 by John L. Hess. Obviously, the information in these articles came from a "leak", which leak was naturally of concern to the Welfare Inspector General. Thereafter, the petitioner requested an opportunity to see the report prior to its public release with an opportunity to prepare a statement of reply, which was refused *in toto*.

Under the circumstances, the request was clearly reasonable in order to have a balanced presentation, and I would reverse and grant that portion of the relief sought.

## APPENDIX C

## Order of Remittitur of the Court of Appeals

Remittitur

COURT OF APPEALS  
STATE OF NEW YORK

The Hon. Charles D. Breitell, Chief Judge, Presiding

No. 1

In the Matter of  
Charles E. Sigety, d/b/a  
Florence Nightingale Nursing Home,  
Appellant,

vs.

Richard V. Horan, Welfare Inspector General  
of the State of New York,  
Respondent.

The appellant in the above entitled appeal appeared by Howard G. Kristol; the respondent appeared by Louis J. Lefkowitz, Attorney General.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. We are in basic agreement with the views expressed by the Appellate Division in its memorandum. As to the federal statute relied upon by appellant, it is sufficient to state that the statute does not apply to reports prepared and originated by state agencies. Further, there is no showing of any legal basis to prohibit a public official from releasing a report that he proposes to release in his official capacity. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court

*Appendix C.*

be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

JOSEPH W. BELLACOSA  
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, January 13, 1977.

**APPENDIX D**

**Notice of Appeal to the Supreme Court  
of the United States**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

Index No. 820/75

NOTICE OF APPEAL

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In the Matter of the Application of  
CHARLES E. SIGETY, d/b/a Florence Nightingale  
Nursing Home,  
Petitioner,

—against—

RICHARD V. HORAN, Welfare Inspector General  
of the State of New York,  
Respondent,

For an Order Pursuant to Article 78 of the  
Civil Practice Law and Rules.

---

PLEASE TAKE NOTICE that petitioner hereby appeals to the Supreme Court of the United States from the judgment entered herein on January 26, 1977, which, upon remittitur from the Court of Appeals of the State of New York by order dated January 13, 1977, affirmed a

*Appendix D.*

judgment of this Court entered herein on October 10, 1975, and this appeal is taken from each and every part of said judgment as well as from the whole thereof.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: New York, New York  
January 26, 1977

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MAYNARD & KRISTOL  
Attorneys for Petitioner  
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**APPENDIX E****Article From "The Village Voice" January 13, 1975**

JACK NEWFIELD

**LATEST NURSING HOME SCANDAL: THE SIGETY COVER-UP**

*Sigety billed Medicaid for personal luxuries like booze and a box at the opera while his patients were being mistreated.*

(PICTURE)

Charles Sigety: Nursing home operator, landlord, and a man with friends in high places

At last, after 20 years, Bernard Bergman seems to be on the run. The Justice Department, the attorney general of New Jersey, several New York DAs, the United States Senate, and the Stein Commission, are peeling away the layers of ghoulish greed.

But Bergman is not the only *gonif* in the nursing home racket. The whole industry is the red light district of health care, where real estate operators and political influence peddlers play monopoly with old bodies.

Look at Charles Sigety.

Sigety began as a Republican bureaucrat; in 1958 he was the first assistant to Attorney General Louis Lefkowitz. Later, in 1962, he became executive director of the state housing and finance agency under Nelson Rockefeller.

By 1972, Sigety owned the Florence Nightingdale Nursing Home at 175 East 96 Street, and was trying to build a second home two blocks away. To open his second home, landlord Sigety evicted dozens of families, mostly the poor and the elderly living on welfare. Sigety's harassment tactics were so brutal that he was fined \$10,000 by the city's Office of Rent Control.



*Appendix E.*

As the landlord for 129 East 97 Street; 114, 116, and 128 East 98th Street; and 1506, 1508, 1514, and 1516 Lexington Avenue, Sigety deprived his tenants of heat, hot water, a super, and locks on the front door; he also hired a managing agent named Bennett Cohen who, according to testimony by tenants, threatened them with a loaded gun. In addition, Sigety sent the tenants false telegrams saying they had lost their case.

Despite his fine for harassment, and despite report after report on miserable conditions in his first nursing home, Sigety received a license to open his second home from the necessary city and state agencies.

On October 4 of 1974, the office of State Welfare Inspector General William Meyers completed a field audit of the finances of the Florence Nightingale home. The audit only covered one year—1972.

Nevertheless, the accountants found \$40,571.26 worth of Medicaid cheating—billing the taxpayers for nonhealth related expenses, and improperly charging them to Medicaid.

Among the personal luxuries Sigety was reimbursed for by Medicaid were:

*Parking fines—\$105*  
*A hotel room in Germany—\$279*  
*The Harvard Club—\$621*  
*G & G Wines and Liquors—\$382*  
*Szechuan Gardens—\$135*  
*K & D Liquors—\$617*  
*D. Sokolin (wine)—\$318*  
*Sherry Lehman (wine)—\$385*  
*Stevens Public Relations—\$1,250*  
*Yale Club—\$190*  
*Metropolitan opera subscription—\$841*  
*Icelandic Airlines—\$554*  
*Telephone bill for Sigety's home in Pennsylvania—\$1,309*  
*Renee Moss Antiques—\$2,355*

*Appendix E.*

*Lord & Taylor (rugs)—\$496*  
*International Persian Rug—\$1,000*  
*Percy Sutton Testimonial dinner—\$100*  
*Real estate taxes on a boarded-up building—\$2,742*

As a result of all this padding, the monthly Medicaid rate, per bed in Sigety's nursing home, was an incredible \$1,444 as of January 1974. This is among the highest in the state.

In 1973, the total Medicaid reimbursement to the Florence Nightingale home was \$4,395,782.

Three months after this audit was completed, its findings have still not been released to the public, or forwarded to any law enforcement agency.

One reason for this apparent cover-up is that Sigety and Inspector General Meyers are close personal friends, and have been comrades in Republican party politics for more than 15 years.

On December 10, 1974, an acquaintance of mine noticed Meyers and Sigety having a cozy lunch together at the Auto Pub on Fifth Avenue. So this week I called Meyers and asked him about it.

"Yes, I did have lunch with Charley last month," he acknowledged.

I asked Meyers if he could recall ever having a private, social lunch with any other person he was supposed to be investigating.

"No, I never did," Meyers said. "Sigety is the only one." What is so special about Sigety?

"Charley and I are good old friends. I worked with Charley years ago in the state division of housing."

Did he ask you about the Florence Nightingale audit?

"Yes. He asked if he could see it when it is released. I told him we had no policy on that."

(Meyers got his housing job after working for the Rockefeller campaign in 1958. Sigety also worked for Rocky in

*Appendix E.*

1958. Meyers was named Inspector General by Malcolm Wilson last year.)

It seems clear to me that Meyers is now severely compromised. It also strains credulity to believe that Attorney General Louis Lefkowitz, another close friend—and former employer—of Sigety's, will aggressively investigate the Medicaid fraud at Florence Nightingale.

Luckily, the incorruptible Robert Morgenthau is now the district attorney of Manhattan. He can be trusted to convene a grand jury to find out why Sigety has billed the public for liquor, parking fines, tickets to politicians' dinners, public relations, and hotel rooms in Germany, while his elderly patients were being neglected and mistreated.

A city health department report on Sigety's Florence Nightingale home, dated February 16, 1972, detailed dozens of violations uncorrected since the department's previous visit. The report concluded: "The management of this home continues to show indifference to the requirements and recommendations of this department." Previous inspections of the Sigety home had shown filth in the kitchen, no recreation for the patients, fire hazards, and an inadequate nursing staff.

\* \* \*

Another nursing home operator who merits scrutiny for possible felonies is Eugene Hollander, a major financial contributor to the Brooklyn Democratic organization, and the president of the nursing home lobbying association.

Hollander for years has been legally represented by the law firm of super power broker William Shea, and specifically by Judah Gribetz, now counsel to Governor Carey. (Gribetz may turn out to be a significant actor in the nursing home drama. Besides formerly being a lawyer for the industry, he has been lobbying privately with Governor Carey to limit the investigation and against the appointment of a special prosecutor. And Gribetz has openly been

*Appendix E.*

calling Voice writers anti-Jewish because of their Bergman articles.)

Hollander owns four nursing homes in the city: The Congress, at 380 Henry Street, Brooklyn; the Park Lane, 1415 Coney Island Avenue, Brooklyn; the Riverview, 117 Beekman Street, Manhattan; and the Gramercy Park, 237 East 17th Street, Manhattan.

Last year, Hollander placed himself on the payroll of all four homes, and collected \$158,000 in salaries alone, above his Medicaid guaranteed profit as owner.

The State Health Department audited three of Hollander's nursing homes in 1971, and found more than \$600,000 in fraudulent bills submitted to Medicaid, including \$276,096 in over-charges at the Gramercy Park Nursing Home, and \$155,571 at the Park Lane.

In addition, the Stein Commission last month discovered that the financial ledgers at the Congress home show more than \$900,000 in "loans" made to other Hollander homes, and to corporations owned by Hollander.

The Stein Commission also revealed that Hollander "fraudulently billed Medicaid" for \$12,000 in "legal fees," actually paid to a relations company, Twersky Associates.

Finally, Hollander has pulled off a suspicious deal with Touro College. Hollander is chairman of the board of Touro, which was given a \$1.3 million building at 30 West 44th Street free of charge by the federal government. Touro two years ago contracted to buy Hollander's four nursing homes for \$29 million, and then lease them back to Hollander, at a profit to Hollander. And at a higher Medicaid reimbursement rate for Hollander.

The trustees of Touro College include Stanley Steingut, Arthur Levitt, and Abe Beame. Records on file at the Board of Elections show Hollander as donating \$1,000 to the political campaign of Robert Seingut in 1973. And \$1,000 to John Rooney's 1972 Campaign against Al Lowenstein.



## Appendix E.

As for the living conditions in Hollander's houses of horror, a patient in the Congress Nursing Home named Patrick Dowd wrote the following letter, dated October 29, 1974, to Mayor Beame:

*"I was put in a room with a lunatic. I have to buy my own sugar, salt, and most of my bread. . . ."*

*"I am unable to walk out, and they refuse to buy me bread with my own money. They are determined to starve me out. All nursing homes give a refund of \$28.50 every month. They take my Social Security check every month, but I get no refund. This costs me more money than living at home, and I haven't got a decent meal since I came here. Sometimes we get two spoonfuls of macaroni and one spoonful of peas for lunch—no meat of any kind."*

*"I don't know who runs this place, but it calls for a thorough investigation. There are plenty of nursing homes where the patients are treated like human beings."*

\* \* \*

Bernard Bergman is the Godfather of the nursing home racket, controlling 100 homes across the country, and admitting to a net worth of \$25 million, as of 1972.

But lesser operators like Sigety and Hollander are equally guilty of the same general abuses as Bergman.

The current investigations into nursing homes should not concentrate exclusively on Bernard Bergman's empire. It is the whole ghoulish, politically protected industry that is corrupt, and it needs to be purified by a prosecutor who has a passion for justice.

## APPENDIX F

**Article From the New York Times,  
Thursday, January 9, 1975**

**MEDICAID BILLED  
FOR TRIP ABROAD**

**NURSING HOME OWNER HERE,  
SIGETY, SAID TO LIST OUTLAY  
OF \$40,571 IN 1972**

By JOHN L. HESS

A draft report of the State Welfare Inspector General's office says that Charles E. Sigety, owner of the Florence Nightingale Nursing Homes, billed Medicaid in 1972 for \$40,571 for his foreign travel, club dues, opera tickets, wine and liquor and other personal items.

Inspector General William F. Meyers denounced yesterday what he described as a leak of the report, which was drafted last October, and said that he had not delayed its publication. Mr. Meyers also confirmed that he discussed the preliminary report at lunch Dec. 10 with Mr. Sigety, whom he called an old friend.

Mr. Meyers said they had spent most of the lunch reminiscing about their experiences together in state housing agencies, but at the end, he recalled, "Charley said, 'All I'd like is to see a copy of the report.'"

Although the Inspector General's office does not give an advance look at its reports to the subjects of its audit, Mr. Meyers said he had told Mr. Sigety he would consider it. Since then, Mr. Meyers said, he has decided that the subjects of audits should be granted this right by law.

**Audit Resumed**

Mr. Meyers added, however, that the audit has been resumed, that the amount of contestable expenditures had grown and that the report would be made public late next week.



*Appendix F.*

In a telephone interview, Mr. Sigety recalled the lunch somewhat differently. He said that he and Mr. Meyers had worked in different agencies and that he thought they had not seen each other for the last 10 years. After the auditors finished a two-month study at Florence Nightingale, Mr. Sigety said, he called Mr. Meyers to ask for a meeting and was invited to lunch. "I know Mr. Meyers slightly," Mr. Sigety said.

At the lunch, Mr. Sigety said, he questioned the validity of the auditors' methods and asked to see a copy of their report before it appeared so that he could rebut it. He said that Mr. Meyers had promised to consider that.

The draft report said the bills to Medicaid considered disallowable included at least \$1,735 in wine and liquor bills, more than \$2,000 for opera tickets, thousands more for air fares and bills in Germany, \$621 to the Harvard Club and \$190 to the Yale Club, \$1,495 for rugs and \$8,600 on various credit cards.

*Bills for Stores Listed*

The Longines Symphonette was down for \$35.26, the New York Philharmonic for \$385, two legal associations for \$120, and various stores, including one in Germany and several antiques dealers here, for several thousand more.

There was also \$1,250 for public relations and \$100 for a testimonial dinner for Borough President Percy E. Sutton of Manhattan.

Mr. Sigety said yesterday that some of the wine and liquor had been for a wedding party for two patients and for prizes of a bottle of champagne to a staff member on each floor. He added that his own accountant had withdrawn certain of the expenditures listed in the audit and that travel expenses were nearly always disallowed by the State Health Department when the annual bills were presented for reimbursement.

Mr. Sigety also noted that the state had ceilings on major categories of cost, and that he usually ran above

*Appendix F.*

the ceilings, so he expected that many of his bills would be disallowed anyway.

*Rate Highest in Borough*

Medicaid pays Florence Nightingale \$1,545 a month per patient, the highest rate for a private nursing home in Manhattan.

The dinner for Mr. Sutton was a community affair, rather than a political function, Mr. Sigety said. Although, like Inspector General Meyers, Mr. Sigety is an active Republican, he gave \$1,000 to Mayor Beame's primary campaign in May, 1973, and \$250 more in September.

It was Mr. Sigety who promoted the 1973 legislation that transferred authority over conditions of nursing homes from the city to the state. Mr. Sigety has said that he regarded the division of roles between the two levels of government as unwise.

The state has always regulated terms of Medicaid payment, with the Federal Government paying half the bill and the city and state each one-quarter. In New York, rates are based on allowable costs of individual homes, plus incentives for economy and a profit on equity.

Representative Edward I. Koch, Democrat of Manhattan, called upon the Department of Health, Education and Welfare this week to reconsider its plan to make the "cost-related" system of nursing home payments under Medicaid nationwide on July 1, 1976. Some states now pay nursing homes on a fixed-fee basis.

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

Supreme Court, U. S.

FILED

JUN 3 1977

MICHAEL RODAK, JR., CLERK

No. 76-1423

CHARLES E. SIGETY, d/b/a FLORENCE NIGHTINGALE  
NURSING HOME,

*Appellant,*

*against*

RICHARD V. HORAN, Welfare Inspector General  
of the State of New York,

*Appellee.*

ON APPEAL FROM THE COURT OF APPEALS  
OF THE STATE OF NEW YORK

**MOTION TO DISMISS**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

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No. 76-1423

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CHARLES E. SIGETY, d/b/a FLORENCE NIGHTINGALE  
NURSING HOME,  
*Appellant,*  
*against*

RICHARD V. HORAN, Welfare Inspector General  
of the State of New York,  
*Appellee.*

---

ON APPEAL FROM THE COURT OF APPEALS  
OF THE STATE OF NEW YORK

---

**MOTION TO DISMISS**

Appellee, Richard V. Horan, Welfare Inspector General of the State of New York, respectfully moves the Court pursuant to Rule 16(a)(b) to dismiss this appeal on the ground that appellant has failed to raise a substantial federal question, and, in part, for want of jurisdiction.

**Opinions Below**

The memorandum decision of the Court of Appeals of the State of New York is reported at 40 N Y 2d 1085; 360 N.E. 2d 1103, and 392 N.Y.S. 2d 421 and is reproduced

at page 7a of the Jurisdictional Statement (hereinafter "J.S."). The opinion of the Appellate Division of the Supreme Court, First Department is reported at 50 A D 2d 779, 376 N.Y.S. 2d 552 and is reproduced at J.S. 3a. The memorandum decision of Supreme Court, New York County, Special Term, is unreported and is reproduced at J.S. 1a.

### **Jurisdiction**

The opinion of the New York Court of Appeals was rendered on January 13, 1977. Notice of Appeal was filed on or about January 26, 1977. Appellant invokes the jurisdiction of the Court pursuant to 28 U.S.C. § 1257(2).

### **Question Presented**

Whether a state statute requiring public disclosure of reports by state officials on the conditions existing at skilled nursing facilities which are Medicaid providers pursuant to Title XIX of the Social Security Law, made pursuant to state law for state regulatory purposes, violates the Constitution and laws of the United States for failure to allow the "provider" an opportunity for inspection of the report and comment thereon prior to its release?

### **Statute Involved**

N.Y. Public Health Law § 2805-e provides:

#### **Maintenance of records**

1. Every residential health care facility shall maintain, as public information available for public inspection under such conditions as the commissioner shall prescribe, records containing copies of all and inspection reports pertaining to the facility that have been filed with or issued by any governmental agency.

Copies of such inspection reports shall be retained in said records for ten years from the date said reports are filed or issued.

2. The office of the commissioner and each regional office of the department shall make available for public inspection and at a nominal cost provide copies of all financial and inspection reports of residential health care facilities filed with or issued by the department.

3. Nothing contained in this section shall be construed or deemed to require the public disclosure of confidential medical, social, personal or financial records of any patient. The commissioner shall adopt such regulations as may be necessary to give effect to the provisions of this section and to preserve the confidentiality of medical, social, personal or financial records of patients.

Added L.1975, c. 654, § 1.

### **Statement of the Case**

This case originated as a proceeding pursuant to N.Y. CPLR Article 78 to prevent the public disclosure of the report of appellee's audit of the books and records of the Florence Nightingale Nursing Home owned by appellant and to require appellee to afford appellant a right of examination and comment upon the report prior to any such disclosure.

Pending determination of this case, disclosure has been stayed pursuant to the order of Special Term, and of the Appellate Division, N.Y. CPLR § 5519(e)\* except that

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\* The New York Court of Appeals has recently held as a matter of state law, under N.Y. CPLR § 5519(e), that the taking of a subsequent appeal automatically continues a pending stay, *DFI Communication, Inc. v. Greenberg*, 41 N Y 2d 805, —

(footnote continued on following page)

appellee has been permitted to deliver copies of the report to the United States Department of Health, Education and Welfare (and by agreement of counsel, to the United States Attorney for the Southern District of New York), to the Moreland Act Commission constituted pursuant to N.Y. Executive Law § 6 investigating the nursing home industry and to Special Deputy Attorney General Charles E. Hynes, the special nursing home industry prosecutor.

This proceeding was apparently precipitated by the publication in the New York Times and the Village Voice (a New York City publication) of material attributed to appellee's draft report to the effect that appellant was being reimbursed with Medicaid funds for personal luxuries disguised as business expenses (J.S. 6-7; 11a; 17a). Appellant contended that this material was false and injurious to him (there is no support in the record for appellant's claim, JAS 15, that the State conceded that this was so). It is appellee's position that, if, in fact, material has been leaked, such disclosure was completely unauthorized but in any event it has nothing to do with this case.

Appellant claimed in his petition that the Welfare Inspector General lacks the legal right under State law to disclose the report under Article 27 of the Executive Law which establishes his office;\* and that the exemption provisions of the State's Freedom of Information Law (N.Y. Public Officers Law, Article 6) and the Federal Social Security Act and regulations required that appellant be given an opportunity for prior inspection and comment on the report.

*(footnote continued from preceding page)*

N.E. 2d —, — N.Y.S. 2d — (1977). It has been suggested that this applies as well to appeals from the courts of the State of New York to this Court, Newman, "Continuation of Stays on Subsequent Appeals", N.Y. Law Journal, April 21, 1977, p. 1, col. 1, p. 26, cols. 1, 3.

\* Since the commencement of this proceeding, Article 27 was recodified at Article 4, §§ 46-50, thereof.

Appellee cross-moved to dismiss the petition for legal insufficiency. In his moving affidavit, he pointed out that the State Freedom of Information Law has placed additional duties of disclosure upon his office; that the report in question is an administrative survey report which is subject to public disclosure and which did not come under the disclosure provisions of the Federal Social Security Act.

This proceeding was argued at Special Term on January 31, 1975, at which time disclosure of the audit was stayed pending further order of the Court.

On September 12, 1975, that Court was formally advised by counsel for appellee of the enactment of N.Y. Public Health Law § 2805-e, L. 1955, c. 654, effective September 1, 1975 (reproduced pp. 2-3, *supra*). The statute in substance provided that all official reports pertaining to nursing homes and like facilities were to be available for public inspection at the facility and at the offices of the Department of Health. This statute, it was urged, mooted the case. The court agreed and granted judgment for appellee on the ground that the case had become moot (1a). On appeal, the Appellate Division affirmed (3a) agreeing with Special Term. It also rejected the argument that appellant had a right of prior inspection and comment (4a). Dissenting in part, Mr. Justice Kupferman would have allowed such inspection of a report under federal regulations and as a matter of fairness (5a-6a).

The Court of Appeals affirmed the Appellate Division on mootness grounds, rejecting at the same time appellant's claim under federal statute and regulations (7a).



## ARGUMENT

**Appellant has failed to raise a substantial federal question requiring plenary consideration by this Court.**

### I.

Appellant's assertion (J.S. 10-14) that the Social Security Act requires that a Medicaid provider be given an opportunity to examine and comment upon a report concerning his activities prior to its release, issued by a state officer in fulfillment of his duties under state laws, designed to vindicate a purely state interest, fails to raise a substantial federal question.

The basis of this claim is that the Welfare Inspector General is one of the State agencies charged with the maintenance of federal standards under the Medicaid law, J.S. 8, 42 U.S.C. § 1396(a)(9). This is absolutely erroneous. New York Social Services Law § 364 delegates this responsibility to the State Departments of Social Services, Health and Mental Hygiene. The reports referred to by appellant, J.S. 10-13, which are subject to prior inspection and comment under 42 U.S.C. §§ 1306(d)(e), 1396(a)(36) and 45 CFR 250.70, are the ones prepared by these agencies in fulfillment of the State plan submitted under New York Social Services Law § 363-a.

The office of the Welfare Inspector General created by New York Executive Law former Article 27 (now Article 4, §§ 46-50), which is part of the State Department of Audit and Control, is charged with the responsibility of inquiring into the operation of the entire state social welfare system. Among other things, it has the duty to protect the State's fiscal interests, which are considerable herein since the State contributes one-half of all Medicaid funds. It has no connection with the State Departments of Social Services, Health, Mental Hygiene or of the local agencies having similar functions denominated in the federal statutory provision relied upon by appellants.

The reports and investigations contemplated by Federal and State law herein may be different in scope and in purpose, but, there clearly is no conflict of governmental interests. Appellant has failed to show any intent upon the part of Congress to preempt the states from regulating Medicaid providers where their conduct touches State interests, *New York Department of Social Services v. Dublino*, 413 U.S. 405, 413 (1973). It would be difficult to read into law a restriction against the investigations by the independent State's Welfare Inspector to detect fraud and chicanery and to expose it to the public. In this, the report has now been held up from publication for two years.

### II.

Appellant's invocation of the "fairness" doctrine JS 14-15, does not present an issue as to the validity of a state statute within the appellate jurisdiction of this Court contained in 28 U.S.C. § 1257(2). Furthermore, the point was never raised or briefed as a federal claim, either at Special Term or in the Appellate Division. This argument was apparently suggested to appellant by the dissenting Appellate Division Justice (6a). Although appellant argued the question before the New York Court of Appeals, it was not passed upon by that Court (7a); and see Official Reporter's summary at 40 N Y 2d at 1086. Thus, it is not reviewable herein, see e.g. *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969).

Even if the question were properly before the Court, it is completely insubstantial and unworthy of plenary consideration. Indeed, the authorities relied upon by appellant JS 14, *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 261 (1974) [White, J., concurring], both rejected the private claim to preservation of one's reputation in favor of the broader social interest in the unfettered dissemination of information. Such a public interest in

free disclosure is present in the instant case. Not only is the public legitimately concerned with the expenditure of its taxes and the care of its aged and infirm, Cf. *Rosenblatt v. Baer, supra*, but this interest has been explicitly recognized by the Legislature and embodied in law, N.Y. Public Health Law § 2805-e, *supra*.

## CONCLUSION

**The appeal should be dismissed.**

Dated: New York, New York  
May 31, 1977

Respectfully submitted,

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